

claimant may select one to direct his ongoing care. That matter was appealed to the Kansas Court of Appeals where it is currently awaiting determination.

In the interim, claimant was provided ongoing treatment with Dr. Kesten of Denver, Colorado. Claimant was working in the Denver area at that time. However, for reasons unclear in the record, when claimant appeared at Dr. Kesten's office in January 2004, he was advised that the insurance company had refused to authorize the visit. Respondent argued at the March 4, 2004 hearing that rather than refusing authorization to see Dr. Kesten, it was Dr. Kesten's determination to take an indefinite leave of absence and that Dr. Kesten's partner would not take claimant as a patient. Additionally, it was noted that claimant moved to southern California, which is where claimant was living at the time of the March 2004 hearing. A dispute arose regarding who would be providing medical care to claimant. As of the March 4, 2004 hearing, respondent had designated Dr. Lynn Wilson of Whittier, California, as the authorized treating physician. Respondent had also submitted the name of Dr. Israel Roderman, but claimant had chosen Dr. Wilson as the acceptable physician for the time being.

The matter proceeded to the post-award hearing on March 4, 2004, regarding this ongoing medical care dispute, with claimant submitting a time sheet at that hearing, indicating John C. Nodgaard, claimant's attorney, and his paralegal had spent 4.56 hours in preparation for the hearing, with Mr. Nodgaard requesting attorney fees at the rate of \$175 per hour and an additional \$75 per hour for Mr. Nodgaard's legal assistant, identified in the time statement as KMO. The Administrative Law Judge, in his Order of March 4, 2004, granted claimant attorney fees in the amount of \$250. There is no indication in the Order as to the basis for the amount awarded.

K.S.A. 44-536, the attorney fee statute, was enacted to enable claimants to obtain competent counsel. In addition, it is part of a statutory scheme intended primarily to benefit injured workers by securing the prompt providing of benefits provided by the Workers Compensation Act.²

K.S.A. 44-536(g) allows for attorney fees when an attorney renders service to an employee subsequent to the ultimate disposition of the original and initial claim. The Director is designated to determine the proper amount of attorney fees on the basis "of the reasonable and customary charges in the locality for such services."³

² *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 786 P.2d 618 (1990).

³ K.S.A. 44-536(g).

In reviewing the statement⁴ submitted at the hearing, the Board notes that first claimant's attorney requests reimbursement at the rate of \$175 per hour. This hourly rate is above the range usually awarded by the Board. The Board has found in the past that \$125 per hour is a reasonable fee and, under the circumstances of this case, awards claimant's attorney \$125 per hour for the time spent.

Cost expenditures associated with the work of legal assistants, as with attorneys, are to be determined on the basis of the reasonable and customary charges for such services. In the Board's opinion, \$45 per hour is a reasonable fee in that matter. The Board will calculate the legal assistant time at \$45 per hour.⁵

Claimant's attorney requests that an additional award for attorney and paralegal fees be granted for the time spent in preparation for the appeal and briefing to the Board. However, no hearing was held on the new fees requested. K.S.A. 1997 Supp. 44-555c allows review by the Board upon questions of law and fact as presented to the administrative law judge. The Board does not have original jurisdiction to consider matters, but is, instead, an appellate body in workers' compensation litigation. The Board, therefore, does not consider new evidence not already presented to the administrative law judge absent a stipulation by all parties to the litigation. Additionally, K.S.A. 44-536 allows the parties the opportunity for a hearing regarding any attorney fees request. The Board is reluctant to make a determination regarding the appropriateness of post-award attorney fees without affording the parties an opportunity for a hearing and to present evidence on the issues relating to those attorney fees.⁶ The Board will, therefore, not consider claimant's request for the additional attorney fees at this time, but, instead, remands the matter back to the Administrative Law Judge for a hearing and determination on that issue.

The Board, therefore, modifies the Order of the Administrative Law Judge to grant claimant's attorney \$345.00 in attorney fees and \$81.00 paralegal fees for a total of \$426.00 and remands the matter back to the Administrative Law Judge for the determination of what additional attorney fees may be due for the time spent in preparation for the appeal and briefing to the Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated March 4, 2004, should be, and is hereby, modified, and post-award attorney fees are assessed against respondent and to

⁴ P.A.H. Trans., Cl. Ex. 2.

⁵ K.S.A. 44-536(g).

⁶ *Lundry v. The Boeing Company*, No. 166,389, 1997 WL 228144 (Kan. WCAB Apr. 25, 1997); *Whisler v. The Boeing Company*, No. 152,107, 1997 WL 228143 (Kan. WCAB Apr. 25, 1997).

claimant's attorney in the amount of \$426.00. Regarding additional attorney fees requested, that matter is remanded back to the Administrative Law Judge for a hearing consistent with these findings.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director